No. 15,720

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS B. RUSTAD, HARVEY R. WYBORNY, HOMER C. SKELLEY, CHARLES DIVEN and JAMES JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellants were convicted after a jury trial and a verdict of guilty in the District Court for the District of Alaska, First Judicial Division, at Juneau, the Honorable Raymond J. Kelly presiding, of the offense of illegal commercial fishing. Appellant Rustad was fined $1,500.00, each of the other appellants were fined $750.00, and proceeds from the sale of certain fish found aboard the vessel used by the appellants in the commission of the offense were forfeited. Appellants

filed notice of appeal from the judgment and sentence imposed by the court.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

Appellants were convicted of fishing commercially for salmon in an area which the court below ruled was closed to commercial fishing at the time in question, which was about 12:30 p.m., July 12, 1956. The place where the appellants were found fishing by the enforcement officers of the U. S. Fish and Wildlife Service was approximately 1.4 miles northwest of Thorns Point on Wrangell Island in the First Judicial Division of Alaska. The place of fishing was close to the shore of Wrangell Island and in the body of water lying between Wrangell Island and Etolin Island, which the Government contended and the jury found to be a part of the waters of Zimovia Strait.

The trial of the case revolved around two main questions:

(a) *Whether Zimovia Strait was an area closed to commercial fishing on July 12, 1956.* This issue was determined by the court, which found as a matter of law that the area was a closed one by virtue of 48 U.S.C. §222 and the Alaska Commercial Fishing Regulations (50 C.F.R., Ch. 1, Sub-Ch. F), 1956, §121.3 and 121.4, as amended by a publication in the Federal Register of July 11, 1956, which read as follows:

"1. §121.3 is amended in text by deleting 'July 15' and substituting in lieu thereof 'July 12'."

The court found that neither the amendment in the Federal Register nor the telegrams sent out by the Administrator of Commercial Fisheries (Defendants' Exhibits A and B, quoted in full at page 3 of appellants' brief) resulted in Zimovia Strait being opened to fishing.

(b) *Whether appellants were in fact fishing in Zimovia Strait.* The Government produced evidence of the time and place of the violation (R. 39-46, 72-74, 79-80), evidence that the term "Zimovia Strait" has a common ascertainable meaning and that the place where appellants were fishing is within Zimovia Strait (R. 77-78, 80-82, 92-97, 100-111, 117-120, 121-124). The jury by its verdict found that appellants were fishing in Zimovia Strait at the time in question.

SUMMARY OF ARGUMENT.

I. Fishing Regulation 121.3 is enforceable and not void for vagueness or indefiniteness as contended by appellants. There is no legal requirement that the boundaries of Zimovia Strait be prescribed and marked as contended by appellants.

(a) Regulation 121.3 is not void for vagueness.

(b) There is no need that the boundaries of Zimovia Strait should be marked.

II. The telegrams sent by the Acting Administrator of Commercial Fisheries did not amend §121.3 so as

to legalize fishing in Zimovia Strait. There is nothing in the contents of those telegrams which would constitute an estoppel of the prosecution of this case.

III. There was no error in giving Instruction No. 10. The instructions were adequate and balanced.

IV. The refusal to let Exhibits A and B be taken to the jury room was entirely proper.

ARGUMENT.

I. FISHING REGULATION 121.3 IS ENFORCEABLE AND NOT VOID FOR VAGUENESS OR INDEFINITENESS AS CONTENDED BY APPELLANTS. THERE IS NO LEGAL REQUIREMENT THAT THE BOUNDARIES OF ZIMOVIA STRAIT BE PRESCRIBED AND MARKED AS CONTENDED BY APPELLANTS.

(a) Regulation 121.3 Is Not Void for Vagueness.

The Government agrees with appellants that regulations, the violation of which imposes criminal punishment, must be sufficiently explicit to inform the public what conduct is prohibited. But the cases cited by appellants are hardly applicable to the case at bar. Most of them involve economic regulatory statutes of sweeping effect, which contained expressions so broad and lacking in precision that no notice was given to the violator of the conduct allowed or proscribed. Here appellants only had to forbear fishing in Zimovia Strait.

In *Connally v. General Construction Co.*, 269 U.S. 385 (1926), cited by appellants, the court, in noting that no precise test can be formulated to separate the

unconstitutionally vague from the constitutionally definite in statutory language, said:

> "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them (citing cases), or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, (citing cases) or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.,* 225 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' " 269 U.S. 391.

In *Champlin Refining Co. v. Corp. Com. of Oklahoma,* 286 U.S. 210 (1932), cited by appellants, the court held void certain provisions of the Oklahoma "Curtailment Act" regulating oil production because of the failure of the statute to define the term "waste". The reason for so deciding was that:

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty." 286 U.S. 242.

In *Lanzetta v. New Jersey,* 306 U.S. 444 (1939), cited by appellants, the term "gang" without further definition rendered a criminal statute void for vagueness.

Exhibits A and B, and not the Federal Register publication, constituted the amendment to Regulation 121.3, it is not true that the wording of either of those telegrams would result in Zimovia Strait being open to fishing on July 12, 1956.

The gist of appellants' argument is that because the message set forth in Exhibits A and B did not in terms exclude Zimovia Strait from the opening of the Anan and Ernest Sound section, the telegram had the effect of opening Zimovia Strait.

In Regulation 121.3 Zimovia Strait is excluded from Ernest Sound and the open waters in the vicinity of Anan Creek so that there will be no doubt that it is subject to the dates set forth in Regulation 121.4. By that mode of regulation Zimovia Strait is not part of the Ernest Sound and Anan section. Rather it is part of the general area defined as the Sumner Strait district in Regulation 121.2, the season for which is set forth in Regulation 121.4. Therefore, it would not be reasonable for a person to conclude on reading the telegram, Exhibit B, that it had the effect of opening Zimovia Strait, as that strait had an entirely separate season from Ernest Sound and the waters in the vicinity of Anan Creek.

By the interpretation the appellants seek to place on the telegrams all closed areas within the Ernest Sound and Anan section would be open, whether they were closed areas at the mouths of salmon streams or areas permanently closed by Regulation 121.11. None of those closed areas are mentioned in the telegrams, and so, by parity of reasoning, they too must

be open if Zimovia Strait is open. Surely this court will not adopt such an unreasonable construction.

It is clear from the context of the telegrams that it was the time of opening set forth in Regulation 121.3 that was being amended and nothing else. Exhibit B, which appellants claim they relied on, says:

> "The Ernest Sound and Anan Section of the Sumner Strait District will open at 6 A M July 12 *instead of July 15* Please advise interested parties." (Emphasis supplied.)

The use of the words "instead of July 15" makes the purpose of the amendment abundantly clear. It is difficult to see how ambiguities can be conjured up from language of that sort. If appellants' argument is correct it would put the U. S. Fish and Wildlife Service in a situation where it could inform fishermen of regulatory changes only at the peril of the most contorted and extreme interpretations that individual fishermen might wish to place on the information given them.

Appellants cite several cases on estoppel of the Government, but it should be noted that these are cases of entrapment. In the instant case there is nothing to show that the government planted the seed of criminality or in any way induced the appellants to fish unlawfully. Perhaps, if the telegrams were truly misleading, e.g., if they contained a mistake in the time of opening of the season, the Government would not be able to prosecute for the violations that ensued. But that is not the case here. There was nothing ambiguous about the text of the messages, as related

above. If there were an ambiguity, or if appellants felt there were one, they could have taken measures to learn the true state of affairs instead of fishing first and finding out later.

The actual amendment to Regulation 121.3 is that contained in the Federal Register of July 11, 1956. But assuming that the telegrams issued by the U. S. Fish and Wildlife Service bind the Government, the court below correctly interpreted those messages as changing only the time of opening set forth in that section.

III. THERE WAS NO ERROR IN GIVING INSTRUCTION NO. 10. THE INSTRUCTIONS WERE ADEQUATE AND BALANCED.

The instructions to the jury (R. 9-21) were ample, concise and balanced. Appellants seek to predicate error on the language of Instruction 10 on the ground that it failed to place the burden on the prosecution of proving the offense beyond a reasonable doubt. The court, however, must examine the charge as a whole in the light of the factual situation disclosed by the record and should not single out any one instruction by itself. *Hertzog v. U. S.,* 9th Cir., 235 F. 2d 664; *Finn v. U. S.,* 9th Cir., 219 F. 2d 894, cert. den. 349 U.S. 906; *Wolcher v. U. S.,* 9th Cir., 218 F. 2d 48, cert. den. 350 U.S. 982 reh. den., 350 U.S. 905.

In the instant case the court defined the presumption of innocence in Instruction 3, clearly placed the burden of proving the offense beyond a reasonable doubt on the Government in Instruction 4, and defined reasonable doubt in Instruction 5. In Instruc-

tion 9 the court defined what was meant by "fishing", and then went on in Instruction 10 to point out to the jury that guilty knowledge or intent to fish illegally was not an element in the case. In so instructing them the court had to make it clear that it was only necessary for the Government to prove actual fishing in contrast to fishing with a criminal intent, and had the court not so instructed the jury they might have been troubled by that question in their deliberations. When the instructions in this case are read together it will be seen that they are fair, that they follow logically one from the other, and that they give a plain and intelligible exposition of the applicable law.

In Instruction 18 the jury was told to consider the instructions as a whole and not to single out any one particular instruction and consider it alone. It must be presumed that the jury took care to do its duty in this regard, and that they did not follow any one of the instructions by lifting it out of its context and ignoring the others.

Appellants urge *State v. Brady,* 78 S.E. 2d 126 (N. Car. 1953), as authority that Instruction 10 in the instant case was defective. It should be noted that the North Carolina court found error in the admission of certain testimony independently of the instruction given. The instruction declared bad by that court used the words "if the State has satisfied you upon all the evidence", whereas in the case at bar the court used the term "prove". The court had already instructed the jury about the burden of proof

so it is hard to see how they could have been led astray as to the meaning of the word.

In *De Groot v. U. S.,* 78 F. 2d 244, cited by appellants, the court was considering a murder case involving complicated elements and facts and felt that the instructions applied to the case as a whole were inadequate. As in many areas of the law, there is no simple formula for determining the adequacy of the instructions in any particular case.

The better approach is that the court need not ritualistically repeat the phrase "reasonable doubt", or reiterate it in each sentence, if the jury is properly instructed once. Thus in *Peters v. U. S.*, 160 F. 2d 319 (C.A. 8th 1947), cert. den. 331 U.S. 825, the defendant was convicted of violating the National Cattle Theft Act, 18 U.S.C. §419(b). Defendant's counsel asked the court to give a supplemental clarifying instruction, and the court instructed the jury that ". . . before you may find the defendant guilty in the case you must find that the cows . . ." were the property of the victim. On appeal defendant raised the failure to recite "beyond a reasonable doubt" in that instruction. The court said:

> "The obvious answer to defendant's argument on this point is that when all parts of the instruction are read together the criticism fails for want of substance. The instruction upon the burden of proof resting upon the Government is complete and correct. One part of an instruction cannot be separated and considered apart from the whole. *Kortz v. Guardian Life Ins. Co.,* 10th Cir., 144 F. 2d 676. The court in the charge given to

the jury said that the burden was 'upon the Government to prove, beyond a reasonable doubt, every material allegation of the indictment.' The essential elements of the indictment were then outlined and the term 'reasonable doubt' carefully defined. In the supplemental instruction given in the instance of defendant's counsel the court by reference thereto amended the statement of the essential elements of the indictment, each of which the jury had already been told must be established by the Government beyond a reasonable doubt. When the whole instruction including the supplemental instruction, supra, is considered there can be no doubt that the jury understood that ownership of the stolen cattle was required to be established by the same degree of proof necessary to establish all other essential elements of the indictment.'' 160 F. 2d at 321.

In *Crawford v. U. S.*, 195 F. 2d 472 (C.A. 3d 1952), the defendant was convicted of possessing goods stolen from an interstate shipment. The court had instructed that the jury should return a verdict of guilty if ''satisfied'' that the Government had proved the elements necessary for conviction. Defendant took exception to this, but the court held:

''Reading the charge as a whole, however, we believe that the trial judge did properly outline the requirement that the proof of the Government had to be beyond a reasonable doubt, and that the jury was aware of the quantum of proof needed particularly since the court introduced the challenged remarks with the clause '. . . and you will deliberate under the laws I have laid down.' '' 195 F. 2d at 475.

In a case of this sort, involving a simple fact situation and relatively simple instructions, it would seem needless and perhaps even confusing to the jury to mention reasonable doubt throughout all parts of the instructions. As the court said in *Orton v. U. S.*, 221 F. 2d 632 (C.A. 4th 1955), cert. den. 350 U.S. 821:

> "Jurors should be given credit for having ordinary intelligence; and if there is one doctrine of the criminal law which they probably understand better than any other it is the presumption of innocence and the burden resting upon the prosecution to establish guilt beyond a reasonable doubt." 221 F. 2d at 635.

IV. THE REFUSAL TO LET EXHIBITS A AND B BE TAKEN TO THE JURY ROOM WAS ENTIRELY PROPER.

At the close of the case the Government asked that Exhibits A and B not be taken to the jury room, and the court granted this request. The court had already ruled that the telegrams did not create an estoppel against the Government, that they could not be interpreted as opening Zimovia Strait to fishing on the date in question, and that the jury would be instructed as to their meaning. Thus those two exhibits could have no evidentiary value to the jury, and would only serve to confuse them in their deliberations. The cases cited by appellants are obviously distinguishable on their facts as they are civil suits involving situations where the exhibits did have a material bearing on the fact issues of the case. Each of those cases recognizes that the matter is within the sound discretion of the court.

There is ample Federal authority that in criminal cases the taking of exhibits to the jury room is within the court's discretion. *Buckner v. U. S.*, 154 F. 2d 317 (Ap. D.C. 1946); *Goins v. U. S.*, 99 F. 2d 147 (C.C.A. 4th 1938).

CONCLUSION.

Appellants have had a trial free from error, the court's rulings below were sound, and the jury which found the appellants guilty was correctly instructed on the applicable law. It is respectfully submitted that the judgment and sentence below should be affirmed by this court.

Dated, Juneau, Alaska,
January 4, 1958.

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